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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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MIKE GLEASON
Chairman
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Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN MAYES
Commissioner
GARY PIERCE
Commissioner

IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS

DOCKET NO. T-01051B-07-0693
T-03608A-07-0693

QWEST CORPORATION'S BRIEF IN SUPPORT OF ITS AUTHORITY TO PETITION FOR ARBITRATION UNDER 47 U.S.C. § 252 AND THE APPLICABILITY OF THE 47 U.S.C. § 252 TIMELINES

Qwest Corporation ("Qwest") hereby files its brief in support of its authority to petition the Arizona Corporation Commission ("Commission") for arbitration under 47 U.S.C. § 252(b), in this matter, pursuant to the Procedural Order issued January 16, 2007.

BACKGROUND

In August 2003, the FCC released the Triennial Review Order ("*TRO*"),[1] in which it

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003)* ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

reinterpreted the "impair" standard of Section 251(d)(2) and revised the list of UNEs that incumbent LECs must provide to requesting carriers. Among other actions, the FCC adopted a set of tests and triggers designed to implement and enforce the 1996 Act's market opening requirements. For switching, high-capacity loops, and dedicated transport, the FCC asked the states to apply the FCC's triggers as a way of determining actual deployment and to conduct a potential deployment analysis under the FCC's new network unbundling rules.

Various parties appealed the *TRO*, and, on March 2, 2004, the D.C. Circuit decided *USTA II.*[2] *USTA II* upheld the *TRO* in part, but remanded and vacated several components of it. On remand, the FCC adopted the Triennial Review Remand Order ("*TRRO*") on December 15, 2004, focusing on those issues that were remanded by the Court. The text of the *TRRO* decision was released on February 4, 2005.[3] One of the matters decided by the FCC was that ILECs no longer have an obligation to provide unbundled access to mass-market local circuit switching.[4] Competitive LECs were given twelve months to submit orders to convert their UNE-P customers to alternative arrangements, and were forbidden from adding new customers using unbundled access to local circuit switching. It is Arizona Dialtone's obdurate refusal to comply with those FCC requirements that gives rise to this proceeding.

DISCUSSION

The FCC understood well that implementation of its elimination of UNE-P and the other non-impairment findings it made in the Triennial Review would necessitate changes to the existing interconnection agreements then in effect between ILECs and their CLEC counterparts. Accordingly, the FCC addressed its expectations about how the parties to those contracts would

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[2] *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[3] Order on Remand, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC release Feb. 4, 2005) ("Triennial Review Remand Order" or "TRRO").

[4] *Id.*, ¶ 199 *et seq.*

swiftly undertake to negotiate the required changes.[5] As shown below, the FCC specifically interpreted Sections 252 (a) and (b) of the Act regarding arbitration of interconnection agreements to mean that in the interconnection amendment context, <u>either the incumbent or the competitive LEC</u> may make a Section 252(a)(1) request for interconnection, services, or network elements, which may become the subject of compulsory arbitration under Sections 252(b)(1) if the parties cannot reach agreement. Also as shown below, the Section 252(b) timeframes apply to that arbitration.

The FCC's interpretation of Section 252(a) and (b) permitting ILECs to initiate requests for interconnection, at least in the context of amendments to interconnection agreements, leaves no ambiguity. The FCC stated:

> Section 252(a)(1) states that "upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers." If the parties cannot reach agreement, the party requesting interconnection, services, or network elements may petition the relevant state commission to arbitrate the dispute. *See 47 U.S.C. § 252(b)(1)*. Such petitions must be submitted between the 135th to the 160th day (inclusive) after the date on which an incumbent LEC received the request for interconnection, services, or network elements. *Id.* The state Commission must resolve the dispute no later than nine months after the date on which the incumbent LEC received the request for interconnection, services, or network elements. *See 47 U.S.C. § 252(b)(4)(C)*. <u>Although section 252(a)(1) and section 252(b)(1) refer to requests that are made *to* incumbent LECs, we find that in the interconnection amendment context, either the incumbent or the competitive LEC may make such a request, consistent with the</u>

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[5] The FCC stated:

> We balance these important considerations against the reality that it would frustrate the statutory scheme and the court's conclusion that impairment [**874] is the "touchstone" of our unbundling [*17316] decision if customers are not transitioned from required unbundled switching as expeditiously as possible. *TRO* ¶ 529:

> [A]dditional guidance is needed here to ensure that parties make the necessary changes to their interconnection agreements in response to this Order in a timely manner. *TRO* ¶ 702:

parties' duty to negotiate in good faith pursuant to section 251(c)(1).[6] (Underlining emphasis added).

This clear ruling was made in very context of the subject matter for which Qwest requires arbitration—the implementation of the provisions of the FCC's Triennial Review decisions. In the *TRO*, in connection with the implementation of the FCC's determinations regarding changes to unbundled network elements, the FCC stated:

> [U]nder the statutory construct of the Act, the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers. The negotiation and arbitration of new agreements, and modification of existing agreements to reflect these new rules, cannot be accomplished overnight. We recognize that many interconnection agreements contain change of law provisions that allow for negotiation and some mechanism to resolve disputes about new agreement language implementing new rules. Although some parties believe that the contract modification process requires Commission intervention in this instance, we believe that individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules. TRO, ¶700 (Footnotes omitted).

The FCC "decline[d] to depart from the Section 252 process,"[7] even though the FCC recognized that ICAs between ILECs and CLECs commonly contain "change of law" provisions. According to the FCC:

> [W]e believe that the section 252 process described above provides good guidance even in instances where a change of law provision exists. As under the default process described above, we expect that parties would begin their change of law process promptly. Once a contract change is requested by either party, we expect that negotiations and any timeframe for resolving the dispute would commence immediately. We also find that the section 251(c)(1) duty to negotiate in good faith applies to these contract modification discussions, as they do under the section 252 process. Accordingly, any refusal to negotiate or cooperate with the contractual dispute resolution process, including taking actions that unreasonably delay these processes, could be considered a failure to negotiate in good faith and a violation of section 251(c)(1)." [8]

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[6] *TRO*, fn. 2087.
[7] *Id.*, ¶704.
[8] *Id.*

In this case, Arizona Dialtone refused to utilize the change of law procedures provided in the parties ICA,[9] thereby negating the applicability of any provisions in the ICA as an alternative process that might otherwise have to be followed instead of Section 252 arbitration. Arizona Dialtone insisted that ultimate resolution of the matter should be achieved through arbitration before the Arizona Commission under Section 252. At one point, Arizona Dialtone expressly made a Section 252(a)(1) negotiation request,[10] but the "window" for filing a petition for arbitration expired with no request having been made. Now, it is Qwest who petitions for arbitration under Section 252, specifically claiming that the action is requested under Section 252 of the Act. Arizona Dialtone has answered that it does not object to the arbitration request, and admits that it is properly before the Commission under Sections 252, and that the timelines of Section 252 apply.[11] Based upon parties' pleadings, and the history of this matter, it cannot be denied that the parties are pursuing arbitration before the Commission under Section 252, and have foregone any contractual process for dispute resolution.[12] As such, the provisions of Section 252, and the timelines provided therein, apply:

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[9] Section 2.2 of the ICA between Qwest and Arizona Dialtone provides, "Where the parties fail to agree upon such an amendment [change of law, or in the terms of the ICA, change of Existing Rules] within sixty 960) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement." As evidenced by Arizona Dialtone's March 3, 2006 letter to Qwest, which is attached as Appendix C to the Petition for Arbitration, Arizona Dialtone refused to enter into Dispute Resolution over the TRRO changes, thereby cutting off application of the "change of law"

[10] *See*, Letter from William D. Cleaveland, counsel for Arizona Dialtone, to Andrew J. Creighton, counsel for Qwest Corporation, dated April 21, 2006, which is attached as Exhibit A to Arizona Dialtone, Inc.'s Response to Qwest Corporation's Petition for Arbitration.

[11] Arizona Dialtone's Response to Qwest Corporation's Petition for Arbitration, ¶ 8, January 18, 2008.

[12] Qwest expressly reserves its claims that Arizona Dialtone breached the parties' ICA by refusing to negotiate an amendment to the parties' ICA reflecting the terms of the TRRO, and by refusing to enter into change of law dispute resolution over that matter. Qwest is pursuing these claims in a parallel Complaint action, *In the Matter of the Formal Complaint of Qwest Corporation Against Arizona Dialtone, Inc. To Enforce Its Interconnection Agreement*, Arizona Corp. Com'n. Dkt. Nos. T-03608A-07-0694, T-01051B-07-0694.

> [U]nder the section 252(b) timetable, where a negotiated agreement cannot be reached, parties would submit their requests for state arbitration as soon as 135 days after the effective date of this Order but no longer than 160 days after this Order becomes effective.[13]

Accordingly, the Commission must proceed with the arbitration under Section 251(b), and act within the timetable provided in that section of the Act.

The portions of the *TRO* cited are applicable even though the FCC subsequently adopted the *TRRO*. While certain substantive portions of the *TRO* were vacated by *USTA II* and superseded by the *TRRO*, the principles set out in the *TRO* ¶¶700-704, were not, and remain applicable in the implementation of *TRRO* provisions. The FCC did not reverse these principles in the *TRRO*, instead, it affirmed them in *TRRO* ¶233 by stating its expectation that carriers "implement the [FCC's] findings as directed by Section 252 of the 1996 Act." (Emphasis added). State utility commissions have a corresponding duty to follow the process under Section 252.

As demonstrated above, the FCC's interpretation of Section 252 clearly allows ILECs to initiate the Section 252 process culminating in compulsory arbitration of issues that were requested to be negotiated. State commissions must defer to the FCC's interpretations of the Act and federal telecommunications law generally and, pursuant to the Hobbs Act, must follow FCC decisions and orders implementing the Act.[14] The Ninth Circuit has explained that the "Act gives the FCC authority to establish regulations implementing the Act" which "must be considered part and parcel of the requirements of the Act."[15]

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[13] *TRO*, ¶703.

[14] 28 U.S.C. §§ 2341-2344; *U S WEST Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1117-18 (D. Colo. 1999) (noting that the "FCC's rules are likewise binding on this Court") (collecting cases).

[15] *U.S. West Communications, Inc. v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002) (citations omitted). Under the Hobbs Act, 28 U.S.C. § 2342, the merits of an FCC decision may be challenged only during direct appellate review. State commissions and federal courts are thus bound to follow the FCC's decision unless and until reversed during such review. *See US WEST Communications, Inc. v. Hix*, 57 F.Supp.2d 1112, 1117 (D. Colo. 1999) ("The [Colorado commission] was required to apply the [FCC Order] in conducting the arbitration and in approving the Agreement."); *Vonage Holdings Corp. v. Minnesota Public Utilities Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004)

Indeed, a number of state commissions have independently concluded that ILECs may initiate requests for negotiations under Section 252. As noted by the Alabama Commission, the Act was never interpreted to be a straitjacket on the ILECs:

> We conclude from our review of the controlling law that it is indeed permissible for ILECs such a BellSouth to initiate requests for negotiation which trigger the statutory arbitration window of §252(b)(1). To construe the provisions of §252(b)(1) to limit such requests for negotiations to CLECs in the present telecommunications environment would undermine the spirit, if not the letter, of §252(b)(1) to the substantial prejudice of ILECs. Provisions such as the one found ... in the 1997 agreement between BellSouth and NOW which continue agreements that have by their terms expired until such time as the parties have negotiated and/or arbitrated new agreements are common place. To interpret §252(b)(1) to allow CLECs to exclusively determine when such agreements are in fact renegotiated would unfairly work to the detriment of ILECs. Congress surely did not intend such a result.[16]

Other state commissions have reached the similar conclusions. One such case arose in Oregon. The Commission adopted the Arbitrator's Decision:

> Beaver Creek contends that Sections 251 and 252 of the Act are for the benefit of CLECs. However, Section 251(b)(5) of the Act states that all local exchange carriers, CLECs and ILECs alike, have a duty to establish reciprocal compensation arrangements for the exchange of telecommunications. Beaver Creek has refused to negotiate the terms of such arrangements with Qwest. Given this situation, Qwest's recourse to Section 252 furthers competition by giving the incumbent a means of requesting the competitive provider to come to terms on the exchange of traffic, as all other CLECs in Oregon that interconnect with Qwest have done. Allowing Qwest to invoke the arbitration procedures in this case levels the playing field for all other CLECs and allows the Commission to exercise the jurisdiction over interconnection arrangements given it in the Act In his situation, allowing the incumbent to send a request for arbitration furthers the goals of the Act.[17]

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[16] Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Now Communications, Inc. Pursuant to the Telecommunications Act of 1996, Docket 27461, 2000 Ala. PUC LEXIS 1052, *5 (June 23, 2000). A copy of this document is attached as Attachment A.

[17] *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and related Arrangements with Beaver Creek Cooperative Telephone Company,* Order No. 02-148, ARB 365, Entered Mar. 7 2002. A copy of this order is attached as Attachment B.

A theme in these state commission decisions is fairness. A cramped reading of Section 252 denying an ILEC the ability to initiate negotiations leading to a compulsory arbitration when the CLEC is intransigent will work an injustice on the ILEC and on other CLECs that have complied.

The Commission asked that the parties also discuss the applicability of the § 252 timelines in the Arbitration matter. Because the FCC has conclusively settled the question that in the context of amendments to interconnection agreements ILECs may initiate requests §§ 252(a)(1) and 252(b)(1), the statutory timetable necessarily applies.

CONCLUSION

For the reasons set forth above, Qwest may initiate requests for negotiations under Section 252(a), and seek and receive compulsory arbitration of the unresolved issues stemming from such requests, under Section 252(b).

RESPECTFULLY SUBMITTED this 28th day of January, 2008.

QWEST CORPORATION

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ATTACHMENT A

PETITION FOR ARBITRATION OF THE INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NOW COMMUNICATIONS, INC., PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET 27461

Alabama Public Service Commission

2000 Ala. PUC LEXIS 1052

June 23, 2000

PANEL: Jim Sullivan, President; Jan Cook, Commissioner; George C. Wallace, Jr., Commissioner

OPINION: PROCEDURAL ORDER

BY THE COMMISSION:

I. Introduction/Background

On February 25, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and NOW Communications, Inc. (NOW) pursuant to the Telecommunications Act of 1996 (the 1996 Act) (hereinafter the BellSouth Petition for Arbitration or the Petition). Said filing was assigned Docket No. 27461.

On March 17, 2000, NOW filed a Motion to Dismiss BellSouth's February 25, 2000 Petition for Arbitration. NOW asserted in its March 17, 2000 Motion to Dismiss that the Commission lacked subject matter jurisdiction to address said Petition due to the fact that BellSouth filed the Petition outside the window established for the filing of arbitrations by § 252(b)(1) of the 1996 Act. More specifically, NOW argued that BellSouth initiated its request for negotiations on August 20, 1999. NOW accordingly implied that the statutory arbitration window expired on January 27, 2000 and could not be amended, extended or waived under any circumstances.

NOW also asserted in its March 17, 2000 Motion to Dismiss that BellSouth failed to comply with the statutory provision of § 252(b) of the 1996 Act by failing to properly provide a copy of its Petition for Arbitration and the documentation supporting it to NOW. NOW did not, however, elaborate further on that issue.

On March 21, 2000 NOW submitted its Response to BellSouth's Petition for Arbitration (hereinafter NOW's Response or Response). In said Response, NOW renewed its previously filed Motion to Dismiss and asserted as its first and second defenses the untimeliness of BellSouth's Petition for Arbitration and BellSouth's failure to comply with the provisions of § 252(b)(2)(B) of the 1996 Act governing the timely and proper service of petitions for arbitration.

As its third defense, NOW asserted in its March 21, 2000 Response that BellSouth had failed to comply with the statutory mandate of good faith negotiations of interconnection agreements pursuant to § 251(c)(1) of the 1996 Act. NOW alleged that BellSouth had conducted a planned and designed scheme of bad faith negotiations which were intended to place NOW in a vulnerable position of accepting onerous terms of adhesion that would destroy the financial and corporate viability of NOW.

As a fourth defense, NOW asserted that BellSouth was in direct violation of the 1996 Act by virtue of its purposeful violation of the provisions requiring the development of competition in local exchange markets. NOW specifically alleged that BellSouth had engaged in anti-competitive behavior which constituted a violation of the Sherman Antitrust Act codified at *15 U.S.C. § 2.*

NOW's fifth defense was that BellSouth, through waiver and agreement, had elected not to exercise its rights, if any, for arbitration under the Act. NOW asserted that BellSouth's agreement to renew and extend the initial interconnection agreement effectively vitiated BellSouth's Petition for Arbitration.

As its sixth defense, NOW asserted that the agreement it originally entered with BellSouth on June 1, 1997 automatically renewed for a period of two years from May 31, 1999 to May 31, 2001. NOW contended that the Commission should dismiss the BellSouth Petition for Arbitration because the initial agreement between the parties remained in full force and effect and had not expired, therefore, depriving BellSouth of any right to proceed with arbitration.

NOW similarly argued that arbitration was inappropriate because the parties had, on the 26th day of January, 2000, affirmed their initial interconnection agreement. The correspondence relied on by NOW for this contention was included as Exhibit 2 to its Response and was attached to BellSouth's original Petition for Arbitration as Exhibit E.

NOW's March 21, 2000 Response included additional background information concerning the negotiations conducted between BellSouth and NOW. NOW also answered each paragraph of the BellSouth Petition for Arbitration and asserted that the issues raised in its previously filed Motion to Dismiss, and renewed in its Response, were primary and threshold issues which were ripe for decision. NOW asserted that the affirmative defenses it had raised would preclude further proceedings on the BellSouth Petition and urged the Commission dismiss BellSouth's Petition for Arbitration. In the event of a determination by the Commission that the arbitration should proceed, NOW contended that an appropriate order requiring arbitration of every term and provision being negotiated between NOW and BellSouth would be required.

On March 28, 2000, BellSouth filed a Response to NOW's March 17, 2000 Motion to Dismiss and therein urged the Commission to deny NOW's Motion. BellSouth noted that it sent a formal request to NOW to renegotiate the existing resale agreement between the parties on August 20, 1999. BellSouth thus agreed that the window for the filing of a petition for arbitration by either party began on January 2, 2000 (the one hundred and thirty fifth day following the commencement of negotiations) and ended on January 27, 2000 (the one hundred and sixtieth day following the formal request to commence negotiations).

BellSouth pointed out, however, that on January 21, 2000, just six days before the arbitration window was to close, NOW submitted to BellSouth a written request to extend the arbitration window in order to allow for continued negotiations between the parties. BellSouth argued that NOW expressly acknowledged in its request that the arbitration window would expire on January 27, 2000, but respectfully requested BellSouth's concurrence to extend the window for the filing of arbitration for a period of thirty days in order to facilitate further negotiations. The NOW letter of January 21, 2000 requesting the thirty day extension was attached to the BellSouth Petition for Arbitration as Appendix D.

BellSouth further represented that a letter was sent to NOW on January 26, 2000 in which BellSouth acknowledged that it would agree to extend the time for the parties to negotiate a new agreement. That letter was attached to BellSouth's Petition for arbitration as Appendix E.

BellSouth argued that the agreement between the parties to extend the time for negotiations was not, as NOW apparently asserted, an agreement to alter the arbitration time lines found in § 251(b)(1) of the 1996 Act, but was instead an agreement to alter the start date of the negotiations between the parties which would trigger the statutory arbitration deadlines. BellSouth represented that the parties basically agreed to continue negotiating and to treat the date that the initial request for negotiations was sent by BellSouth as having been sent on September 19, 1999 as opposed to August 20, 1999. BellSouth argued that pursuant to that approach, the statutory window for arbitration closed on February 25, 2000, the date that BellSouth filed its Petition for Arbitration with the Commission.

BellSouth further noted that NOW submitted correspondence to BellSouth on February 22 and February 23 requesting yet another extension of the arbitration window. BellSouth pointed out that it declined to agree to the further extensions requested by NOW. The correspondence memorializing the additional NOW requests for extension and BellSouth's response thereto were attached to BellSouth's Petition for Arbitration as Exhibits F and G respectively.

With regard to NOW's contention that BellSouth failed to comply with the statutory provisions of § 252(b) by improperly failing to provide a copy of its Petition for Arbitration and the documentation in support thereof to NOW, Bell-

South represented that it served a copy of its Petition for Arbitration with the Exhibits attached thereto upon at least two representatives of NOW on the same day that the petition was filed with the Commission. BellSouth asserted that its actions in that regard clearly demonstrated its compliance with the service requirements of § 252(b).

On March 29, 2000 the Commission issued a Procedural Ruling dismissing NOW's March 17, 2000 Motion to Dismiss. In response, NOW filed on April 7, 2000 a Motion to Dismiss, a Motion for the Commission to Reconsider NOW's earlier Motion to Dismiss and a Motion for Hearing on its Motion's.

In its April 7, 2000 filing, NOW reemphasized that the interconnection between BellSouth and NOW which was approved by the Commission on November 17, 1999 was still in full force and effect until June 1, 2001. More specifically, NOW argued that because BellSouth failed to provide the written notice of its intent to terminate required by Section I., B of said agreement, it automatically renewed on June 1, 1999 for two one year terms. NOW accordingly argued that there was nothing to negotiate pursuant to § 252 of the 1996 Act and that the Commission had no subject matter jurisdiction to arbitrate under § 252(b)(1). NOW, therefore, urged the Commission to dismiss BellSouth's Petition to Arbitrate based on the argument that the 1997 agreement entered between BellSouth and NOW remained in full force and effect until June 1, 2001 or in the alternative because BellSouth's Petition was untimely filed.

On April 17, 2000, BellSouth filed its Response to NOW's April 7, 2000 filing. BellSouth argued therein that NOW's additional Motion to Dismiss was improper and should be rejected in light of the Commission's March 29, 2000 Ruling dismissing NOW's original Motion to Dismiss. BellSouth further argued that NOW's Request for Reconsideration of the Commission's March 29, 2000 dismissal of NOW's March 17, 2000 Motion to Dismiss was also improper under Rule 21 of the Commission's Rules of Practice. More specifically, BellSouth argued that NOW had not submitted new evidence which would support its Motion for Reconsideration.

BellSouth further argued in its April 17, 2000 filing that contrary to the arguments raised by NOW, there was no reason why the parties could not arbitrate a new agreement prior to the expiration of their existing agreement. BellSouth argued that such occurrences are in fact common place and necessary for continued operation.

BellSouth further noted in its April 17, 2000 filing that it sent a letter to NOW on March 30, 2000 formalizing its intent not to renew the existing agreement between the parties for an additional period of one year. BellSouth noted that the written statement of its intent not to renew the existing agreement was sent in spite of the fact that BellSouth had negotiated with NOW in good faith for a number of months and NOW was well aware of BellSouth's desire to enter into a new agreement long before the existing agreement was set to expire by its terms. BellSouth respectfully requested that the Commission deny NOW's second Motion to Dismiss and allow the matter to proceed to arbitration in order that the parties may enter into a new resale agreement which is needed for the parties to continue doing business.

II. The April 21, 2000 Prehearing Conference

In order to address the issues in NOW's pending Motions and its Response to BellSouth's Petition for Arbitration, the Commission scheduled a Prehearing Conference for April 21, 2000. NOW and BellSouth were allowed at said Prehearing Conference to orally argue the issues pending before the Commission. Both parties essentially reemphasized the arguments raised in their previous pleadings.

Counsel for NOW strongly reiterated NOW's position that the resale agreement entered between NOW and BellSouth in 1997 was in full force and effect until May 31, 2001 due to BellSouth's failure to specifically notify NOW in writing of BellSouth's intention to terminate the agreement at least sixty (60) days before its original termination date of May 31, 1999. Counsel for NOW also asserted that pursuant to § 252(b) of the 1996 Act, incumbent LECs such as BellSouth may not initiate requests for negotiations which trigger the statutory window for arbitration.

Citing a decision of the California Public Service Commission in *In Re: Petition by Pacific Bell For Arbitration of an Interconnection Agreement with Pac-West Telecom, Inc., 1999 Cal. PUC LEXIS 70* (Cal. Public Utilities Comm'n February 4, 1999) (*In Re: Pac Bell)* (attached to BellSouth's March 28, 2000 response as Exhibit 2), counsel for BellSouth argued that ILECs could indeed initiate requests for negotiations pursuant to § 252(b) of the 1996 Act. Counsel for BellSouth also asserted that BellSouth and NOW had mutually and properly agreed to extend the date that BellSouth originally requested negotiations with NOW in order to allow for further negotiations. The FCC's decision *In Re: Armstrong Communications, Inc. Petition for Relief Pursuant to § 252(e)(5) of the Telecommunications Act of 1996, 13*

F.C.C. Rcd. 871, DA 98-85, P's 10-11 (January 22, 1998) (*In Re: Armstrong)* (attached to BellSouth's March 28, 2000 Response as Exhibit 1) was cited as support for that proposition.

III. Discussions and Conclusions

Following the April 21, 2000 prehearing conference the parties each submitted information concerning action taken in the jurisdictions of Louisiana and Kentucky on BellSouth's Petition for Arbitration with NOW. The information and arguments so presented have been considered in this Ruling.

It appears from a review of the record that the first issue to be addressed is the status of the agreement entered between BellSouth and NOW in 1997. NOW essentially argues that the 1997 agreement is in full force and effect until May 31, 2001 due to BellSouth's failure to properly terminate said agreement by providing written notice of its intent to do so at least sixty (60) days prior to the agreement's original termination date of May 31, 1999. (Tr. at p. 7) BellSouth essentially argues that it clearly communicated to NOW its intention to renegotiate the existing agreement between the parties as early as October of 1998 and that NOW clearly understood BellSouth's intentions in that regard. Given NOW's insistence on written termination notice, however, BellSouth represented that it formally provided written notification to NOW of its intention to terminate the agreement via a March 30, 2000 letter from Paige Miller, the BellSouth employee responsible for negotiations with NOW. (Tr. at p. 33)

BellSouth asserts that its provision of the written termination notice discussed above properly terminated the 1997 BellSouth/NOW agreement as of May 31, 2000. NOW, however, maintains that BellSouth's failure to provide termination notice at least sixty (60) days prior to the original termination date of May 31, 1999 resulted in the contract automatically renewing for two years through May 31, 2001. NOW essentially argues that the automatic extension language in the 1997 agreement ambiguously stated that the failure of either party to properly terminate the agreement prior to May 31, 1999 would result in the automatic renewal of the agreement for "two one year terms" as opposed to two separate one year terms as argued by BellSouth. NOW argues that pursuant to Georgia statute *O.C.G.A. § 13-2-2(5)*, the ambiguous extension language in the 1997 agreement must be construed in its favor due to the fact that BellSouth drafted the provision in question. (Tr. at pp. 9-10).

BellSouth concedes that pursuant to the terms of its 1997 agreement with NOW, Georgia law governs the contract between the parties. BellSouth argues, however, that the automatic extension language in the 1997 agreement between BellSouth and NOW clearly contemplates two separate one year terms. BellSouth thus asserts that it properly terminated the 1997 agreement as of May 31, 2000. BellSouth contends that NOW also conceded the termination date of May 31, 2000 in pleadings before the Tennessee Public Service Commission on these same facts and issues (Tr. at pp. 31-35) (*See* BellSouth's Hearing Exhibit 1 at page 2).

Based on the foregoing, it is ruled that the 1997 agreement between BellSouth and NOW has been properly terminated. Contrary to the arguments of NOW, the automatic extension language found at § I., B of the 1997 agreement clearly contemplates two separate one year terms and BellSouth has properly terminated the agreement as of May 31, 2000. It is, therefore, unnecessary to address the merits of NOW's assertion that parties may not arbitrate disputes concerning interconnection or resale agreements which are in full force and effect. We note, however, that it certainly appears reasonable and prudent to commence the renegotiation of agreements which are approaching expiration in order to minimize service interruptions.

We now turn to an assessment of NOW's argument that ILECs such as BellSouth may not initiate requests for the negotiation of interconnection or resale agreements which trigger the arbitration window of § 252(b)(1) of the 1996 Act. NOW maintains that it never requested renegotiations with BellSouth concerning the 1997 agreement between the parties and implies that BellSouth's August 20, 1999 correspondence officially requesting negotiations with NOW was ineffective to pull the statutory trigger of § 252(b)(1). NOW concedes that it participated in negotiations with BellSouth, but only in the context of settling the litigation which NOW instituted against BellSouth in the United States District Court for the Northern District of Alabama.

BellSouth concedes that the language of § 252(b)(1) indicates that ILECs must receive requests for negotiations, but argues that the language in question must be placed in the context of what was intended by Congress with the passage of the 1996 Act. (Tr. at p. 25) Specifically, BellSouth notes that at the time of the passage of the 1996 Act, local exchange telephone service was a monopoly. Accordingly, there was then no reason for ILECs to pursue interconnection or resale agreements with CLECs.

Some four years removed from the passage of the Act, however, BellSouth argues that literally hundreds of interconnection agreements, both resale and facilities-based, are in place. (Tr. at p. 27) Given the current regulatory environment, BellSouth alleges that an interpretation of § 252 which exclusively allows CLECs to initiate requests for the renegotiation of existing agreements would be prejudicial to ILECs. (Tr. at p. 27)

BellSouth further asserts that the California Public Service Commission in *In Re: Pac Bell*, addressed this same issue and established, under circumstances which closely parallel those present in this case, that ILECs can indeed initiate requests for negotiation which trigger the statutory arbitration window of § 252(b)(1). In *In Re: Pac Bell*, the California Public Service Commission concluded that certain correspondence by Pacific Bell, the ILEC, to Pac West, the CLEC, constituted a de facto bonafide request for negotiations which commenced the statutory arbitration window of § 252(b)(1) of the 1996 Act. (Tr. at p. 28-29)

NOW, however, asserts that there are circumstances which distinguish the California Commission's holding in *In Re: Pac Bell* from the case at bar. Specifically, NOW contends that the California Commission's decision in *In Re: Pac Bell* was founded on the premise that there was "no other credible reason" for negotiation between Pac Bell and Pac West other than for purposes of negotiating an interconnection agreement pursuant to § 252 of the 1996 Act. NOW alleges that in the present case, its desire to pursue the settlement of its litigation with BellSouth constituted "more than credible other reasons" for NOW to negotiate with BellSouth. (Tr. at p. 38-39) NOW also alleges that the December 22, 1999 letter from Paige Miller of BellSouth to Mr. Larry Seab of NOW (which was marked as NOW Exhibit 1 and admitted into evidence at the Prehearing Conference of April 21, 2000) reveals that NOW was not in fact negotiating or renegotiating its 1997 agreement with BellSouth, but was instead negotiating with BellSouth for purposes of settling the litigation between the parties.

We conclude from our review of the controlling law that it is indeed permissible for ILECs such as BellSouth to initiate requests for negotiation which trigger the statutory arbitration window of § 252(b)(1). To construe the provisions of § 252(b)(1) to limit such requests for negotiations to CLECs in the present telecommunications environment would undermine the spirit, if not the letter, of § 252(b)(1) to the substantial prejudice of ILECs. Provisions such as the one found in § I., B of the 1997 agreement between BellSouth and NOW which continue agreements that have by their terms expired until such time as the parties have negotiated and/or arbitrated new agreements are common place. To interpret § 252(b)(1) to allow CLECs to exclusively determine when such agreements are in fact renegotiated would unfairly work to the detriment of ILECs. Congress surely did not intend such a result.

With regard to NOW's arguments that there were "other credible reasons" for its negotiations with BellSouth, we note that BellSouth's negotiating posture was certainly crystallized by the December 22, 1999 correspondence from Ms. Miller. BellSouth clearly conveyed in said correspondence that it was, and had been, negotiating toward a resale agreement with NOW since it served a formal request for such negotiations on August 20, 1999.

Although there were indications in Ms. Miller's correspondence of December 22, 1999 that NOW informed BellSouth as late as November 22, 1999 that it had not entered into resale negotiations with BellSouth, Mr. Larry Seab in correspondence dated January 21, 2000, confirmed that BellSouth had activated the statutory arbitration window for negotiating an agreement with its August 20, 1999 request for negotiations. Mr Seab in fact acknowledged that the expiration of the arbitration window was on January 27, 2000 (Mr. Seab's January 21, 2000 letter was appended to BellSouth's Petition for Arbitration as Exhibit D) and requested a thirty day extension thereof.

A follow up letter of January 26, 2000 which was signed by Ms. Miller of BellSouth and Mr. Seab of NOW further memorialized the parties' understanding that the August 20, 1999 letter from BellSouth created an arbitration window for unresolved issues of January 2, 2000 through January 27, 2000. (Said correspondence was attached to BellSouth's Petition for Arbitration as Exhibit E) The January 26, 2000 correspondence also recognized that NOW had requested "to *move from negotiating a stand-alone resale agreement* to negotiating a full blown interconnection agreement containing provisions for combining unbundled network elements." Importantly, the January 26, 2000 correspondence also confirmed the mutual agreement of BellSouth and NOW to extend the arbitration window thirty days to allow for further negotiations.

NOW's acknowledgment of the statutory arbitration period is even further reflected in correspondence from NOW's attorney to BellSouth dated February 22, 2000. In that correspondence, NOW, through its attorney, requested an additional 20 day extension of the arbitration window. (Said correspondence was attached to BellSouth's Petition for Arbitration Exhibit F) BellSouth denied that request.

It is apparent from the foregoing that despite NOW's representations to the contrary, both parties understood and agreed that BellSouth's August 20, 1999 correspondence to NOW requesting negotiations was intended to trigger the statutory arbitration window of § 252(b)(1) for purposes of negotiating a resale agreement. The January 26, 2000 correspondence signed by representatives of both parties memorialized NOW's subsequent transition from the negotiation of a resale agreement to the negotiation of an interconnection agreement and demonstrated the mutual understanding of the parties that the arbitration window set to expire on January 27, 2000 was still applicable. Given the clarity of that January 26, 2000 correspondence and NOW's correspondence of February 22, 2000, seeking further extension of the arbitration window, it is difficult to lend credence to NOW's theory that it never intended to engage in the negotiation of a new resale agreement or the renegotiation of its existing agreement with BellSouth. NOW's well established conduct to the contrary simply belies such a position.

We lastly turn to an assessment of NOW's argument that the arbitration window of § 252(b)(1) is statutorily established and thus cannot be waived under any circumstances. BellSouth argues that the January 26, 2000 letter executed by BellSouth and NOW which extended the arbitration window 30 days did not, as NOW apparently contends, alter the arbitration time lines found in § 252(b)(1). BellSouth instead argues that the parties agreed to alter the start date for the parties' negotiations which would trigger the statutory arbitration deadlines. Specifically, BellSouth contends that the agreement was to treat BellSouth's August 20, 1999 request for negotiations having been served by BellSouth on September 19, 1999. According to BellSouth, that agreement between the parties moved the arbitration deadline from January 27, 2000 to February 25, 2000, the date on which BellSouth filed its Petition for Arbitration. (Tr. at p. 23)

In support of its position, BellSouth argues that the FCC was given broad regulatory oversight over the implementation and enforcement of the Telecommunications Act of 1996. (Tr. at p. 24) As such, BellSouth contends that great weight should be given to the FCC's decision in *In Re: Armstrong* wherein the FCC articulated numerous findings and conclusions concerning Congress's intentions with regard to the statutory arbitration window of § 252(b)(1). Specifically, BellSouth points out that the FCC in *In Re: Armstrong* discussed the Congressional preference for voluntary negotiations between parties to interconnection agreements and the Congressional concern that parties to negotiations would seek arbitration prematurely without giving good faith negotiations a chance to succeed. BellSouth argues that the agreement between it and NOW to alter the start date of the arbitration window of § 252(b)(1) was a mutually agreed upon, good faith attempt to give negotiations a chance to succeed. BellSouth argues that such an approach is consistent with the public interest and the intentions of Congress in promulgating § 252(b)(1). (Tr. at p. 30-31)

BellSouth is correct in noting that Congress granted the FCC broad supervisory authority over the implementation and enforcement of the provisions of the 1996 Act such as § 252(b)(1). As a result, we place great emphasis on the FCC's decision in *In Re: Armstrong* wherein the FCC indeed emphasized that Congress's primary purpose in establishing an arbitration window in § 252(b)(1) was to prevent parties from seeking arbitration prior to giving voluntary negotiations an adequate opportunity to succeed. (*In Re: Armstrong* at P11) It thus appears that the mutual agreement between BellSouth and NOW to extend the date from which the arbitration window of § 252(b)(1) would be calculated in order to accommodate further negotiations between the parties was entirely consistent with Congress's goals in promulgating § 252(b)(1).

The mutually agreed upon 30 day extension did not, in and of itself, result in detriment or procedural unfairness to either BellSouth or NOW. To the contrary, the good faith negotiations conducted during said extension were intended to work to the mutual benefit of the parties and were consistent with the primary purposes and preferences of Congress in its promulgation of § 252(b)(1) of the 1996 Act.

As a general principle, agreements between parties to alter the start date of negotiations which trigger the arbitration window of § 252(b)(1) should be encouraged in order to further Congress's goal for negotiations between parties. Such agreements merely allow the parties flexibility in determining the date from which the statutory deadlines of § 252(b)(1) are calculated and should not be construed as waivers of the statutory time frames of § 252(b)(1).

We fully recognize, as did the FCC in *In Re: Armstrong,* that "it is well established in *other* contexts that statutory deadlines cannot be waived or extended except in very limited circumstances." (*In Re: Armstrong* at P11) In the context of § 252(b)(1) of the 1996 Act, however, such a strict interpretation concerning statutory time periods and their waiver would limit negotiations instead of encouraging them as Congress intended.

In light of the foregoing, we conclude that it would be extremely prejudicial to BellSouth to grant NOW's Motion to Dismiss and thereby allow NOW to disavow its previous agreement altering the start date of the negotiations which triggered the arbitration window of § 252(b)(1). Given the prevalence of agreements wherein parties have negotiated the date that their negotiations are deemed to have begun for purposes of calculating the statutory time frames of § 252(b)(1), we find that a dismissal of BellSouth's Petition for Arbitration in this cause would, at a minimum, have a chilling effect on future negotiations between telecommunications carriers. We will not allow NOW to create such uncertainty in this or future cases by granting NOW's Motion to Dismiss BellSouth's Petition for Arbitration.

Based on the foregoing, NOW's Motion to Dismiss and Motion for Reconsideration is hereby denied.

The Parties are instructed to confer and submit a mutually-proposed procedural schedule for the arbitration in this cause within ten (10) days of the effective date of this Order.

IT IS SO RULED, this 23rd day of June, 2000.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionCommunications LawU.S. Federal Communications CommissionGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility Commissions-General Overview

ATTACHMENT B

ORDER NO. 02-148

ENTERED MAR 7 2002

This is an electronic copy. Attachments may not appear.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 365

In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Beaver Creek Cooperative Telephone Company.	)	ORDER

DISPOSITION: ARBITRATOR'S DECISION ADOPTED AS MODIFIED

Introduction

On August 10, 2001, Qwest Corporation (Qwest) filed a petition for arbitration of interconnection rates, terms, conditions, and related arrangements with Beaver Creek Cooperative Telephone Company (Beaver Creek). Qwest filed the petition pursuant to 47 U.S.C. sections 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act).

On September 4, 2001, Beaver Creek filed a response to Qwest's petition. On September 21, 2001, Beaver Creek filed a motion to strike Qwest's petition on the ground that the petition is procedurally flawed. Qwest responded on September 27, 2001, with a request that the motion to strike be suspended and a procedural conference be scheduled as soon as possible.

On September 28, 2001, the Arbitrator ruled that the petition and the motion to strike addressed the same issues and suspended Qwest's obligation to respond to the motion until further determination at a prehearing conference. A conference was held in this matter on October 26, 2001. On November 2, 2001, the Arbitrator issued a prehearing conference memorandum adopting a schedule for the remainder of the docket and deferring a decision on Beaver Creek's motion to strike until fact finding could occur in this case.

The parties submitted prefiled direct and responsive testimony and determined that a hearing was not necessary. They filed simultaneous briefs on January 11, 2002. The arbitrator issued her decision on February 11, 2002. Beaver Creek filed comments on the decision on February 21, 2002.

Standards for Arbitration

This proceeding is being conducted under 47 U.S.C. section 252, the arbitration provision of the 1996 Act. The Commission has also adopted rules governing arbitration procedures under the Act. *See* OAR 860-016-0000 *et seq.* Subsection (c) of Section 252 of the Act provides:

> Standards for Arbitration—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Commission Review

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted for approval to the state commission. Section 252(e)(2)(B) provides that the state commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Summary of Commission Decision

Beaver Creek filed comments taking issue with portions of the Arbitrator's Decision. The Commission has reviewed the Arbitrator's Decision and the comments in accordance with the standards set out above. We conclude that the Arbitrator's Decision, as modified herein, comports with the requirements of the Act, applicable Federal Communications Commission (FCC) regulations, and relevant state law and regulations.

Beaver Creek Comments

Beaver Creek raises six issues with respect to the Arbitrator's Decision. Three issues are procedural and are considered together.

Issue I—Commission Jurisdiction

Beaver Creek again raises the issue that this matter is not properly before the Commission because the arbitration provisions of section 252(b) of the Telecommunications Act of 1996 (the Act) cannot be triggered by an incumbent local exchange carrier. The Arbitrator's Decision deals with this issue and we subscribe to the resolution in that Decision.

Issue II—Qwest's Interconnection Agreement is Inappropriate Because It Includes Provisions Inapplicable to Beaver Creek's Operations

Qwest submitted an interconnection agreement with its petition. Beaver Creek refused to enter into negotiations with Qwest about the agreement and did not address Qwest's proposed agreement with sufficient specificity to allow the Arbitrator to modify the agreement. In other arbitrations before this Commission, parties have gone paragraph by paragraph through the proposed interconnection agreement to allow the Arbitrator to choose between their positions. Beaver Creek did not engage in adequate discussion of provisions in Qwest's proposed agreement to allow such choice. The Arbitrator therefore correctly adopted Qwest's proposed agreement in toto.

Beaver Creek urges that the Commission should adopt its agreement rather than Qwest's. Beaver Creek's agreement is based on bill and keep rather than providing for reciprocal compensation for exchange of competitive traffic. The Arbitrator's Decision explains that bill and keep may substitute for the obligation on all carriers to establish reciprocal compensation arrangements under section 251(b)(5) if both carriers agree. Qwest does not agree to such a regime or it would not have filed a petition for arbitration. For this reason alone, Beaver Creek's proposed interconnection agreement is inadequate.

Issue III—The Arbitrator's Decision Failed to Address the Outstanding Issue of Qwest's Routing Traffic Improperly Through the Oregon City/Beavercreek EAS Trunk

Beaver Creek raised the issue of Qwest's behavior in the Beavercreek exchange, where Beaver Creek is the incumbent. The Arbitrator properly decided that this issue is not before the Commission in an arbitration proceeding filed by Qwest for the purpose of establishing an interconnection relationship to deal with competitive traffic in the Oregon City exchange. Beaver Creek has other remedies for Qwest's alleged wrongs against it. For one thing, Beaver Creek could have voluntarily negotiated an agreement with Qwest that would address its concerns about its own exchange.

Issues IV and V—The Time Lines *in the* Ordering Paragraphs Do Not Accord with Commission Rules

Beaver Creek correctly points out that the time lines in the ordering paragraphs of the Arbitrator's Decision do not accord with Commission rules. The Commission has modified the ordering paragraphs to read as follows:

ARBITRATOR'S DECISION

1. Within 14 days after the Commission issues its arbitration decision, Qwest shall prepare an interconnection agreement complying with the terms of the arbitration decision and serve it on Beaver Creek. Beaver Creek shall either sign and file the agreement or file objections to it within 10 days of service of it. If objections are filed, they shall state how the agreement fails to comply with the arbitration decision, and offer substitute language complying with the decision. The Commission will approve or reject a filed interconnection agreement within 30 days of its filing, or the agreement will be deemed approved. The contract shall include Qwest's most current forms and pricing.

2. The contract is effective upon final approval by the Commission.

Issue VI—The Interconnection Agreement Should Be Updated to Include Qwest's Most Current Forms and Pricing

The Commission agrees with Beaver Creek on this issue and has included this requirement at the end of Paragraph 1 (*noted above*).

ORDER

IT IS ORDERED that the Arbitrator's Decision in this case, attached to and made part of this order as Appendix A, is adopted as modified herein.

Made, entered, and effective ______________________.

Roy Hemmingway Chairman	**Lee Beyer** Commissioner
	Joan H. Smith Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ORDER NO. 02-148

ISSUED February 11, 2002

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 365

In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Beaver Creek Cooperative Telephone Company.	)	ARBITRATOR'S DECISION

Procedural History

On August 10, 2001, Qwest Corporation (Qwest) filed a petition for arbitration of interconnection rates, terms, conditions, and related arrangements with Beaver Creek Cooperative Telephone Company (Beaver Creek). Qwest filed the petition pursuant to 47 U.S.C. §§251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act).

On September 4, 2001, Beaver Creek filed a response to Qwest's petition. On September 21, 2001, Beaver Creek filed a motion to strike Qwest's petition on the ground that the petition is procedurally flawed. Qwest responded on September 27, 2001, with a request that the motion to strike be suspended and a procedural conference be scheduled as soon as possible.

On September 28, 2001, the Arbitrator ruled that the petition and the motion to strike addressed the same issues and suspended Qwest's obligation to respond to the motion until further determination at a prehearing conference. A conference was held in this matter on October 26, 2001. On November 2, 2001, the Arbitrator issued a prehearing conference memorandum adopting a schedule for the remainder of the docket and deferring a decision on Beaver Creek's motion to strike until factfinding could occur in this case.

The parties submitted prefiled direct and responsive testimony and determined that a hearing was not necessary. They filed simultaneous briefs on January 11, 2002.

Applicable Law

This proceeding is being conducted under 47 U.S.C. § 252(b), the arbitration provision of the 1996 Act. The Commission has also adopted rules governing arbitration procedures under the Act. *See* OAR 860-016-0000 *et seq.*

Findings of Fact

Qwest is an incumbent local exchange carrier (ILEC) in the Oregon City exchange. Beaver Creek, a cooperative and a completely facilities based carrier, is the ILEC for the adjacent Beavercreek exchange. As ILECs that serve neighboring exchanges, Qwest and Beaver Creek have exchanged Extended Area Service (EAS) traffic between end users in each exchange since 1979. EAS permits a Beaver Creek end user in the Beavercreek exchange to originate a call that terminates to a Qwest end user in the Oregon City exchange without having to incur interexchange, intraLATA toll charges. The same principle applies for calls made by Qwest end users in the Oregon City exchange to Beaver Creek end users in the Beavercreek exchange. EAS traffic is noncompetitive; that is, the carriers who exchange EAS traffic are not competing for the same end users in the same exchange.

Beaver Creek was certified as a competitive provider in Oregon by Order No. 96-248.[1] Beaver Creek offers and provides local exchange service and carrier access service to end users in the Oregon City exchange, in direct competition with Qwest. Beaver Creek routes calls originated by its Oregon City end users to Qwest end users in the same Oregon City exchange through its central office in the Beavercreek exchange and then across the EAS trunk groups to Qwest's central office in the Oregon City exchange, for termination to the Qwest end user. Qwest and Beaver Creek do not have an interconnection agreement that governs their exchange of traffic in the Oregon City exchange. Beaver Creek is using the EAS trunk groups, which were designed for the transfer of noncompetitive, interexchange traffic, to transfer competitive traffic.

On March 5, 2001, Qwest sent Beaver Creek a formal request to negotiate an interconnection agreement. Beaver Creek responded that it did not accept the letter as a request to negotiate under 252(a) because Qwest is an ILEC and Beaver Creek is a CLEC. Beaver Creek asserted that the Act allows only a CLEC to request negotiation with an ILEC. Qwest filed its petition in the present matter on August 10, 2001, pursuant to 252(b) of the Act and OAR 860-016-0000 *et seq.*

All other CLECs in Oregon that exchange competitive traffic with Qwest have entered into interconnection agreements with Qwest.

[1] Although Beaver Creek agrees that it is a CLEC for purposes of federal law (and hence of this proceeding), Beaver Creek contests that it is a CLEC for state law purposes. Two cases are currently pending before the Oregon Court of Appeals in which Beaver Creek argues that it should not be classified as a CLEC for purposes of state certification under ORS 759.020.

Issue

In its petition for arbitration, Qwest identified the following issue: Is Beaver Creek, a CLEC that operates in Qwest's ILEC exchange, required to execute an interconnection agreement with Qwest to establish the terms, conditions, and prices of interconnection between the two companies?

Beaver Creek's response consists of four points. First, Beaver Creek asserts that under the terms of the Act, Qwest as an ILEC may not invoke the negotiation that triggers the arbitration provisions of the Act. Second, Beaver Creek argues that since it is operating in the Oregon City exchange as an ILEC, specifically as a cooperative simply expanding the boundaries of the cooperative, the provisions of §252 of the Act do not apply. Third, Beaver Creek maintains that Qwest's petition is factually incorrect in alleging that Beaver Creek has refused to negotiate. Beaver Creek asserts that after the Commission issued Order No. 00-711, Beaver Creek requested that Qwest negotiate an agreement that would cover only local number portability (LNP), and Qwest refused to do so. Fourth, Beaver Creek argues that it should not be forced into an agreement with Qwest that contains numerous provisions that are inapplicable to Beaver Creek's operations.

Beaver Creek's Motion to Strike. The threshold issue in this proceeding is Beaver Creek's first point, which is also the subject of its motion to strike. Section 252(b) of the Act provides:

> (1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Beaver Creek reads this subsection to preclude Qwest, as an ILEC, filing a petition to arbitrate. Because Qwest has not *received a request* for negotiation, Beaver Creek reasons, the arbitration provisions of the Act have not been triggered and Qwest's petition must be dismissed. Beaver Creek argues, in other words, that only CLECs can trigger the clock for arbitration.

Beaver Creek contends that the rules of statutory construction support this conclusion. Beaver Creek notes that Congress passed the Act in order to foster competition in local telephone service. The intended beneficiaries of the Act, according to Beaver Creek, are new entrants, the CLECs. Beaver Creek argues that Qwest, the ILEC, is trying to avail itself of the benefits of §252 of the Act, but it does not have the right to do so. Beaver Creek maintains that Qwest has recently argued to the Federal District Court of Oregon that "The goals of Sections 251 and 252 are very different than Section 253. Sections 251 and 252 are clearly designed to aid new entrants and impose requirements on incumbents." *Qwest Corporation v. City of Portland*, Oregon Federal

District Court No. 01-1005-JE, Qwest Brief in Opposition to Motion to Dismiss or for Summary Judgment.

Resolution. Beaver Creek's interpretation of 252(b)(1) is overly restrictive. To understand the meaning of the subsection in question, it is necessary to consider the purpose of the Act as a whole. Beaver Creek correctly identifies the purpose as fostering competition in local telephone service.

In the usual case, incumbents have telephone networks in place with which CLECs want to connect. The language of §252(b)(1) assumes this state of affairs. However, the factual situation in this proceeding is not the usual case. Beaver Creek is an established ILEC in its own exchange and for purposes of the Act is a CLEC in Qwest's Oregon City exchange. Beaver Creek is using existing EAS facilities, designed for ILEC to ILEC exchange of traffic, for competitive traffic. Beaver Creek is physically able to exchange competitive traffic without further interconnection with Qwest's network.

Beaver Creek contends that Sections 251 and 252 of the Act are for the benefit of CLECs.[2] However, Section 251(b)(5) of the Act states that all local exchange carriers, CLECs and ILECs alike, have a *duty* to establish reciprocal compensation arrangements for the exchange of telecommunications. Beaver Creek has refused to negotiate the terms of such arrangements with Qwest.[3] Given this situation, Qwest's recourse to Section 252 furthers competition by giving the incumbent a means of requesting the competitive provider to come to terms on the exchange of traffic, as all other CLECs in Oregon that interconnect with Qwest have done. Allowing Qwest to invoke the arbitration procedures in this case levels the playing field for all other CLECs and allows the Commission to exercise the jurisdiction over interconnection arrangements given it in the Act. In this situation, allowing the incumbent to send a request for arbitration furthers the goals of the Act.

Other state commissions have allowed incumbents to send requests for arbitration under Section 252(b) as well. *See, e.g., Re BellSouth Telecommunications, Inc.*, Docket No. 001305-TI PSC-01-1180-FOF-TI (Fla. PSC May 23, 2001) *(BellSouth); Re Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U5266),* Decision No. 99-02-014, 1000 Cal PUC LEXIS 70 (Cal. PUC February 4, 1999) (Pac-West).

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[2] Qwest has explained that its arguments before the Oregon District Court in the City of Portland case were not interpretations of Sections 251 and 252 but addressed the meaning of Section 253. In any event, we do not take Qwest's statement about Sections 251 and 252 as dispositive here. Section 251 clearly imposes duties on all local exchange carriers, for example.

[3] Beaver Creek argues that it has not refused to negotiate with Qwest, asserting that it has not refused to negotiate with Qwest but rather that it has tried to negotiate a LNP only agreement for some time. In the context of the present proceeding, however, Beaver Creek's response to Qwest's March 5, 2001 request for negotiation qualifies as a refusal to negotiate for purposes of the arbitration sections of the Act.

For the above reasons, Beaver Creek's motion to strike is denied. The Commission has jurisdiction to process Qwest's petition for arbitration.

Is Beaver Creek Required to Execute an Interconnection Agreement with Qwest? In its response to Qwest's arbitration petition, Beaver Creek asserts that since it operates in the Oregon City exchange as an ILEC, as a cooperative expanding its boundaries as a cooperative, the provisions of Section 252 of the Act do not apply to it. Beaver Creek appears to have dropped this argument and admits that for purposes of this proceeding it is a CLEC in the Oregon City exchange. Beaver Creek also argues in its response that Qwest's petition is factually incorrect in alleging that Beaver Creek has refused to negotiate. This argument is addressed above; Beaver Creek refused, in its response to Qwest's March 5, 2001 letter, to enter into negotiations on the interconnection agreement that Qwest requested.

The remaining issue is whether Beaver Creek must execute an interconnection agreement with Qwest. Beaver Creek makes a number of arguments in opposition to Qwest's position that it must do so.

First, Beaver Creek contends that Qwest is wrong in arguing that an interconnection agreement is required as a matter of law. Beaver Creek maintains that courts have determined that Sections 251 and 252 of the Act are intended to benefit CLECs, not ILECs. Beaver Creek cites to *Verizon North, Inc. v. Strand*, 140 F.Supp.2d 803, 812 (W.D.Mich 2000). This case is not on point. It deals with the criteria for determining whether a statute creates an individual federal right enforceable under Section 1983 of the Civil Rights Act, a very different issue from the one presented in this arbitration. Beaver Creek also cites to *GTE Northwest Inc. v. Hamilton*, 971 F.Supp. 1350, 1352 (D.Or. 1997), with no further elucidation of that case's relevance.

It is clear that in the present context, CLECs and ILECs both have obligations under Section 251, as noted above. The fact that in the usual situation the Act was intended to benefit CLECs does not excuse Beaver Creek in the instant case from its obligation to negotiate terms and conditions of interconnection under Section 251(b).

Beaver Creek next argues that the Commission's orders in docket IC 3, a case brought by Beaver Creek against Qwest, does not decide the issue of whether a written interconnection agreement is necessary in the present case. Beaver Creek characterizes the decision in docket IC 3 as narrow, holding only that if Beaver Creek wished to avail itself of one of the services available under Section 251 (in that case, LNP), it must do so through an interconnection agreement. Order No. 00-440 as amended by Order No. 00-711 at 4.[4]

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[4] The relevant passage reads:
We conclude that the Act mandates carrier to carrier interconnection agreements for services in subsections (1) through (5) of Section 251(b). Read together with §251(c) and §252, we conclude that those agreements must take the form of written interconnection agreements. Subsection 251(c)(1) imposes on an incumbent carrier the duty to negotiate in good faith to reach agreement on how to provide the services mandated in Sections (b) (1)-(5). Section 252 requires that agreements be filed with and approved by the

Beaver Creek maintains that contrary to the Commission's language in Order No. 00-711, the Act does not require a Section 252 interconnection agreement for any service provided under Section 251. Section 251(f) exempts rural carriers from certain obligations, specifically Section 251(c) obligations including the responsibility to execute an interconnection agreement. However, rural carriers are still responsible for meeting their obligations under Section 251(b); for instance, they must provide LNP and do not need an interconnection agreement to do so. Also, Beaver Creek asserts, most state commissions have set ground rules for providing dialing parity (required by Section 251(b)(3)) without an interconnection agreement.

Beaver Creek argues that it does not wish to avail itself of any of the services available under Section 251, having determined that at present LNP is not a necessary service. Beaver Creek also contends that it does not need unbundled elements under Section 253(c)(3), because it is a completely facilities based carrier. Nor does it need resale at a discount under Section 251(c)(4) or collocation under Section 251(c)(6).

Beaver Creek argues, finally, that it does not need an interconnection agreement for reciprocal compensation, because it has established a bill and keep relationship with Qwest for the exchange of traffic in Oregon City. Beaver Creek argues that its routing traffic over EAS trunks exactly mirrors Qwest's routing traffic in the Beavercreek exchange. This, according to Beaver Creek, reflects a bill and keep arrangement between Beaver Creek and Qwest. Beaver Creek also argues that Qwest has allowed Hood Canal Communications to route competitive local traffic over an EAS trunk in the State of Washington. Beaver Creek believes that the Hood Canal situation belies Qwest's assertion of burden because Qwest allows Hood Canal to route competitive traffic over EAS trunks.

Resolution. Beaver Creek competes with us in Qwest's Oregon City exchange, routing calls over EAS trunks to Qwest end users. Beaver Creek wishes to maintain this arrangement without an interconnection agreement, on the basis of bill and keep.

Bill and keep is an acceptable substitute for reciprocal compensation if both parties agree to it. Here it is clear that Qwest does not agree to bill and keep; otherwise Qwest would not have filed its arbitration petition. The obligation to establish reciprocal compensation arrangements under Section 251(b)(5) is a duty for CLECs and ILECs alike; therefore it is a duty for Beaver Creek.

relevant state commission. Section 252 also prohibits preferential treatment of any carrier and mandates that the terms of agreements be made available to all carriers. These requirements clearly contemplate a written interconnection agreement for the provision of services pursuant to §251(b). In requiring a written interconnection agreement for provision of LNP, Qwest has not violated the Act.

Beaver Creek's arguments about how Qwest behaves in the Beavercreek exchange do not bear on the decision in this proceeding. According to Section 252(b)(4)(A) of the Act:

> The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

Neither Qwest's petition nor Beaver Creek's response, set out above, raises the issue of Qwest's behavior in the Beavercreek exchange. That question is not relevant to this proceeding.

The Hood Canal situation does not argue against Qwest's position that it should have an interconnection agreement for competitive local traffic. Qwest points out that it has an interconnection agreement with Hood Canal, under which the parties have a separate local competitive trunk group within the same facility as the EAS trunks to carry the local competitive traffic. Beaver Creek contends that the separate trunk group makes no difference to the burden on the network. However, the issue in this proceeding is not the amount of burden on Qwest's network but Beaver Creek's obligation to arrange with Qwest for reciprocal compensation for local competitive traffic.

Beaver Creek contends that the Act does not require interconnection agreements for the services listed at Section 251(b)(1)-(5) of the Act. I disagree. Although the issue the Commission addressed in docket IC 3 was limited to LNP, the reasoning the commission used is applicable here as well (*see* Footnote 4 above). The rural carrier exemption is not relevant here, precisely because it is an *exemption* from the requirements otherwise imposed on incumbents, and neither Qwest nor Beaver Creek claims rural carrier status. Where state commissions have intervened and established ground rules, as for dialing parity, those rules govern the relationship between carriers and preempt the need for an interconnection agreement. But for a matter such as reciprocal compensation, the parties must have a written interconnection agreement.

I conclude that Beaver Creek must, as a matter of law, have an interconnection agreement with Qwest to establish reciprocal compensation for competitive local traffic. This requirement puts Beaver Creek on equal footing with the other CLECs in Oregon that interconnect with Qwest and allows the Commission to exercise the oversight over carrier to carrier agreements that the Act gives us.

Which interconnection agreement should the Commission order the parties to adopt? OAR 860-016-0030(4) provides in relevant part:

> After the oral hearing or other procedures (for example, rounds of comments), each party will submit its "final offer" proposed agreement. The arbitrator will choose between the two final offers.

Beaver Creek's proposed agreement addresses only the interexchange of local traffic on a bill and keep basis. In support of Commission adoption of its agreement, Beaver Creek simply states "that is all that is being done in this case and that is all that is needed."

Beaver Creek argues that it does not need many of the provisions of the interconnection agreement Qwest submitted. However, its objections to Qwest's proposed agreement are not specific. Beaver Creek lists a number of provisions that it considers unnecessary, but asserts that the list is not exhaustive. The vague nature of Beaver Creek's response means that Beaver Creek does not present the Commission with specific issues for decision. Beaver Creek could also have negotiated with Qwest to design a more appropriate agreement but chose not to do so.

Given the evidence presented, I choose Qwest's proposed agreement as the interconnection agreement between Beaver Creek and Qwest for competitive traffic.

Arbitrator's Decision

1. Within 30 days of the Commission's final order in this matter, Qwest Corporation shall submit to Beaver Creek a contract incorporating terms that reflect the Commission's final decision. The contract shall bear the signature of a person authorized by Qwest to sign the contract.

2. Within 5 days of receipt of the contract from Qwest, Beaver Creek shall return the contract to Qwest with the signature of a person authorized by Beaver Creek to sign the contract. Beaver Creek shall also file a copy of the contract with the Commission.

3. The contract is effective immediately upon delivery of the signed agreement to Beaver Creek.

4. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated this 11th day of February, 2002, in Salem, Oregon.

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Ruth Crowley
Arbitrator